



ROCKY MOUNTAIN WILD

Protecting wild lands for wildlife

August 16, 2018

Brian Ferebee
1617 Cole Boulevard
Lakewood, CO 80401
Cc'd to: r2_ro_e-foia@fs.fed.us

Re: 2018-FS-R2-05258-F

Mr. Ferebee,

We have received your FOIA response letter dated August 7, 2018. As you and your agency are well aware, Rocky Mountain Wild ("RMW"), San Luis Valley Ecosystem Council ("SLVEC"), and San Juan Citizens Alliance ("SJCA") have all filed numerous FOIA requests on the same subject matter and have been granted fee waiver without question. Your sudden unwillingness to provide prompt access to agency records, as contemplated by the statute, is consistent with repeated demonstration in federal court that the Forest Service is acting with bias to force us to file an Objection to the July 19, 2018, Village at Wolf Creek Access Project Draft Record of Decision without the benefit of all the information allegedly supporting this decision. This pattern and practice of delaying access to agency records violates several federal laws, including FOIA, Endangered Species Act, and the National Environmental Policy Act.

In an effort to simplify this process, SLVEC and SJCA voluntarily dismiss themselves from this FOIA request. The information supporting the appropriateness of a Fee waiver is provided for RMW. The guidelines, found at 7 CFR, Subtitle A, Part 1, Subpart A, Appendix A, Section 6(a)(1) obviously support a fee waiver in this case:

(1) The subject of the request, i.e., whether the subject of the requested records concerns "the operations or activities of the government"

RMW's FOIA request seeks:

all agency records regarding the proposed Village at Wolf Creek Access Project, the July 19, 2018 Draft Record of Decision, and anything else relating to this project or the agency

action including internal and external communications, consultation with the U.S. Fish and Wildlife Service, contact with other agencies, contact with Leavell-McCombs Joint Venture and communications with any other entity.

This is clearly a request concerning "the operations or activities of the government."

(2) The informative value of the information to be disclosed, i.e., whether the disclosure is "likely to contribute" to an understanding of government operations or activities. (The requester bears the burden of identifying "with reasonable specificity" the public interest served.)

Rocky Mountain Wild, the Friends of Wolf Creek coalition¹, and members of the public² have worked for decades to inform its members and carry out its organizational mission, which includes efforts to protect the National Forest from impacts of a massive development on Wolf Creek Pass that the Forest Service itself declared in 1986 was not in the public interest based on a drastically smaller proposal. The past and present Forest Service decisions involve increased access to a private parcel needed to construct this 10,000 person city. Rocky Mountain Wild has used information to inform local, state, and federal elected officials submitted numerous Comments, an administrative Appeal, a pre-decisional Objection, a State Court Case, two Federal Court Cases, and a 10th Circuit Appeal, on behalf our members and in conjunction with other organizations representing their members, highlighting the unlawfulness of past decisions and the detrimental impacts of this ill-conceived project. The documents we have received through FOIA in the past have contributed to a better understanding of government operations, activities, and these specific decisions. The public interest served is the protection of Wolf Creek Pass as an important wildlife corridor, bioregion, watershed, habitat for the federally listed Canada lynx, and for all the reasons outlined in the various documents throughout the years. The past FOIA requests revealed political pressure and agency bias, as documented in orders of multiple federal judges. The current request is likely to reveal, not only to the public, but to agency officials who have stood up to, and resisted the pressure to ignore requirements of federal land management laws, whether there is ongoing pressure or bias within the Forest Service consideration of the Wolf Creek Village Proposal. Uncovering agency corruption and bias, and engaging in statutory decisionmaking processes are among the highest public interests recognized by FOIA. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.").

(3) The contribution to an understanding of the subject by the general public likely to result from disclosure, i.e., whether disclosure of the requested information will contribute to "public understanding". (Factor 3 concerns whether disclosure of the information will contribute to the public at large, and requires the requester to have the ability to disseminate the information to the general public. Requesters cannot satisfy the standard merely by representing that they will make the information available to others. Requesters have the

¹ Friends of Wolf Creek is a coalition of organizations including Rocky Mountain Wild is focused on protecting Wolf Creek Pass from the massive Village at Wolf Creek development. See <http://www.friendsofwolfcreek.org/>

² An online petition opposing this development was signed by 81,741 people who are kept updated about this issue. See <https://www.change.org/p/tom-tidwell-chief-usda-forest-service-stop-the-destruction-of-wolf-creek-pass-in-sw-colorado>

(burden of demonstrating with particularity that the information will be communicated to the public.)

RMW uses the information it obtains through FOIA requests to educate the public about the actions of the federal government, information about this development proposals, impacts to the region and protected species, the unlawfulness of the past Wolf Creek Decisions³, corruption in Forest Service decisionmaking to favor private interests over protection of federal public land, and protected species, and any other relevant information obtained. Rocky Mountain Wild uses several avenues to disseminate this information to the public. Rocky Mountain Wild has posted FOIA documents on its website⁴, and on the Friends of Wolf Creek website.⁵ Rocky Mountain Wild has issued press releases and informed other media⁶ based on information obtained in FOIA requests. Rocky Mountain Wild organizes events focused on educating the public about the importance of Wolf Creek Pass.⁷ Rocky Mountain Wild helps the public engage in the administrative processes involving Wolf Creek pass.⁸ All these efforts to disseminate information to the general public depend on prompt access to agency records. The information obtained through this FOIA request will be disseminated in the same ways to the public.

(4) The significance of the contribution to public understanding, i.e., whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. (The public benefit should be "identified with reasonable specificity".)

The Forest Service's July 19, 2018, Draft Record of Decision is likely based on undue influence and bias, particularly since it adopts the private developer's claim that the decision can go forward on the FEIS that was completed in 2014, and held unlawful in a 2017 Order of the Federal Court. The Forest Service has a long history of letting developers ghost draft documents. In 2006, the practice of allowing the developer to ghost draft legal interpretations relied upon by the Forest Service was ferreted out based on a FOIA request, and subsequent resolution of motions to hold Forest Service FOIA personnel in contempt of court. Colorado Wild v. Clark, 05-cv-01173-JLK-DW, ECF No. 40.

The last time the public had the opportunity to comment on this NEPA document was in 2012. Much has changed since 2012 on Wolf Creek pass and in the surrounding regions, and the documents created or obtained over this six year period will significantly contribute to the public understanding of the actions proposed by many of the same agency personnel who have demonstrated clear bias in favor of the developer's environmental perspectives and legal arguments. The agencies failure to supplement this stale analysis makes FOIA the only avenue to assess and gain a better understanding of what is

³ As evidenced by Federal Court cases Colorado Wild v. Forest Service, 06-cv-2089-JLK-DW and Rocky Mountain Wild v. Dallas, 15-cv-1342-RPM.

⁴ See http://rockymountainwild.org/wolf_creek

⁵ See <http://www.friendsofwolfcreek.org/background/>

⁶ See <http://fourcornersfreepress.com/pressure-emails-released-forest-service-response-foia-action-show-village-wolf-creek-developers-prodded-agency/>; <http://pagosadailypost.com/2016/01/19/opinion-forest-service-concealed-or-destroyed-village-documents/>

⁷ <http://rockymountainwild.org/wolf-creek-bioblitz-aug-22> - Bioblitz organized on August 22, 2015 to educate the public about Wolf Creek pass.

⁸ http://rockymountainwild.org/submitting_objection

allegedly supporting this new decision. Past Wolf Creek FOIA requests have disclosed collusion between the developer and the contractors, attempts by the Forest Service to hide information from the public, how the past decisions were influenced by illegal means, unanalyzed potential access alternatives, impacts that were not identified or analyzed in the NEPA documents, agency staff's concerns about agency actions, other agencies concerns about Forest Service actions, studies and reports relevant to the project, and countless other items that helped RMW and the public understand what really took place within the agency and resulted in unlawful decisions. This information on bias, alone or in combination with the normal information contained in the Forest Service records created or obtained to meet its federal land management duties, has and will continue to contribute "significantly" to public understanding of government operations and activities.

(5) The existence and magnitude of a commercial interest, i.e., whether the requester has a commercial interest that would be furthered by the requested disclosure

Rocky Mountain Wild is recognized by the United States Internal Revenue Service as a 501(c)(3) nonprofit organization. RMW does not have a commercial interest in the requested disclosure. Despite the inferences in the response, RMW's potential use of the information in public interest litigation - among other uses - does not constitute a commercial interest that could warrant denial of a fee waiver request.

(6) The primary interest in disclosure, i.e., whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester." (Factor 6 requires an agency to balance the requester's commercial interest against the identified public interest in disclosure and determine which interest is "primary.")

Rocky Mountain Wild is recognized by the United States Internal Revenue Service as a 501(c)(3) nonprofit organization. The disclosure is wholly concerned with the public interest in ensuring the Forest Service manages the National Forest in accordance with policies and purposes of federal land management laws, free of bias and undue pressure from commercial project proponents.

Rocky Mountain Wild clearly fulfills all criteria for a fee waiver.

Other issues in August 7, 2019 Letter:

- I. Rocky Mountain Wild is not seeking production of documents that have already been posted online within the administrative record. In order to avoid confusion, please ensure the Forest Service response specifically identifies each URL that contains an agency record deemed responsive to the FOIA request. General reference to jump cites and links in online documents do not satisfy FOIA duties.
- II. Rocky Mountain Wild does not agree with the range of search dates or the search cut-off date provided in the letter and looks forward to discussing this further once the agency agrees to proceed with a search.

III. RMW's FOIA request **does** "include communications within, among, and between the Forest Service, USDA's Office of the General Counsel (OGC) and the U.S. Department of Justice (DOJ) as related to" any past or current litigation. These communication are not necessarily protected by Exemption 5 or the attorney-client privilege by virtue of ongoing litigation. Any such assertion of privilege must be supported within a lawful Vaughn index. This aspect of the request should have no bearing on our ability to qualify for a fee waiver, but does confirm the public interest in requested records that may disclose whether or not there has been any attempt by the private developer (and its attorneys) to exert undue influence on the Forest Service and its OGC and DOJ representatives.

We acknowledge that the August 7, 2018 letter has added complexity to what should be a fairly straight forward and routine FOIA request for records needed to participate in an ongoing Forest Service administrative proceeding that was conducted in secret from at least December 2018 until June 2018. Without more information, we will not acknowledge that this FOIA request constitutes *unusual* or *exceptional* circumstances, as those terms are used by FOIA.

We look forward to prompt action to help ensure that RMW, our coalition, and members of the public receive the requested information in the timely manner contemplated by the FOIA.

Sincerely,



Matthew Sandler
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